

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

SYAH REDBIRD,

Plaintiff,

v.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, et al.,

Defendants.

Case No. 2:21-cv-00500-APG-VCF

**ORDER**

Plaintiff Syah Redbird, who is incarcerated in the custody of the Nevada Department of Corrections (NDOC), filed a complaint in state court, which the defendants removed to this court. ECF No. 1. It appears from the documents and the removal statement that removal to federal court was proper. Because Redbird is a prisoner, I must screen the complaint under 28 U.S.C. § 1915A. The defendants have also moved to dismiss some of Redbird's claims. ECF No. 5. Because 28 U.S.C. § 1915A requires that I consider whether the complaint states a claim under Federal Rule of Civil Procedure 12(b)(6), I will incorporate the parties' arguments regarding the motion for dismissal into my screening order.

**I. SCREENING STANDARD**

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). The court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d

1 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two  
2 essential elements: (1) the violation of a right secured by the Constitution or laws of the United  
3 States, and (2) that the alleged violation was committed by a person acting under color of state  
4 law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

5 The Prison Litigation Reform Act (PLRA) requires a court to dismiss a prisoner's claim  
6 if "the allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a  
7 claim on which relief may be granted, or seeks monetary relief against a defendant who is  
8 immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a  
9 claim upon which relief can be granted is provided for in Federal Rule of Civil Procedure  
10 12(b)(6), and the court applies the same standard under § 1915 when reviewing the adequacy of  
11 a complaint or an amended complaint. When a court dismisses a complaint under § 1915(e), the  
12 plaintiff should be given leave to amend the complaint with directions as to curing its  
13 deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be  
14 cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
16 *Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim  
17 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim  
18 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999).  
19 In making this determination, the court takes as true all allegations of material fact stated in the  
20 complaint and construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma*  
21 *Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less  
22 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9  
23 (1980). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a

1 plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,  
2 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is  
3 insufficient. *Id.*

4 A reviewing court should “begin by identifying pleadings [allegations] that, because they  
5 are no more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*,  
6 556 U.S. 662, 679 (2009). “While legal conclusions can provide the framework of a complaint,  
7 they must be supported with factual allegations.” *Id.* “When there are well-pleaded factual  
8 allegations, a court should assume their veracity and then determine whether they plausibly give  
9 rise to an entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim  
10 for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial  
11 experience and common sense.” *Id.*

12 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the  
13 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on  
14 legal conclusions that are untenable (e.g., claims against defendants who are immune from suit  
15 or claims of infringement of a legal interest which clearly does not exist), as well as claims based  
16 on fanciful factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*,  
17 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## 18 **II. SCREENING OF COMPLAINT**

19 Redbird sues the Las Vegas Metropolitan Police Department (LVMPD), Daniel Madrid,  
20 and Perry Crooks for events that took place while she<sup>1</sup> was incarcerated at Clark County  
21 Detention Center (CCDC). ECF No. 1-1 at 1, 3. She asserts six claims and seeks monetary  
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23 <sup>1</sup> Redbird uses female pronouns in her complaint. ECF No. 1-1 I will follow her preference and use female pronouns when referring to her.

1 relief.

2       The complaint alleges the following: On April 2, 2019, Redbird was a pretrial detainee at  
3 CCDC. Redbird identifies as transgender, has a slight build and feminine appearance, and was  
4 undergoing hormone therapy while incarcerated. The defendants were aware of these facts.

5       At some point on April 2, 2019, another inmate named Andrew Henley, who was facing  
6 charges for murder and other violent crimes, harassed Redbird and made fun of her appearance.  
7 Redbird asked Henley to stop, and Henley responded, “Fuck you bitch, wait until I get my hands  
8 on you.” Redbird approached Madrid, a correctional officer, and told him about these threats.  
9 Madrid stated that he would talk to the unit officer about the threats.

10       Later that day, Crooks, a correctional officer, came to Redbird’s cell and told her and her  
11 cellmate that they were to be moved upstairs, which is where Henley was housed. Redbird  
12 objected to being moved to the same area as Henley and told Crooks that Henley had threatened  
13 her. Crooks responded that Redbird had to move or face discipline.

14       Redbird agreed to the move, and after she moved upstairs, Henley was seen talking and  
15 laughing with Crooks, as if they were good friends. Henley then walked by Redbird’s cell and  
16 said loudly enough for other inmates and possibly staff to hear, “you fucked up now faggot, I’m  
17 gonna smash you at chow.” Shortly thereafter, an inmate worker came to Redbird’s cell and  
18 warned him to “be ready” at chow. Redbird also heard Henley yelling to other inmates that  
19 Redbird had “told” on him and that Henley would “beat his ass” at chow.

20       At approximately 4:45 pm, Redbird was at dinner eating when she saw Henley  
21 approaching. Redbird stood up to face him, and Henley smashed Redbird in the head with a  
22 dinner tray. Henley proceeded to attack Redbird with his hands and feet, kicking Redbird  
23 repeatedly and knocking him unconscious. Redbird was taken to the hospital and diagnosed with

1 a head injury, as well as lacerations of the scalp and face that required stitches and resulted in  
2 permanent scars.

3 Based on these allegations, Redbird brings Eighth and Fourteenth Amendment claims  
4 against Crooks and Madrid; *Monell* claims against LVMPD; a state law negligence claim against  
5 all defendants; a state law negligent training, supervision, and retention claim against LVMPD; a  
6 state law intentional infliction of emotional distress claim against Crooks; and a state law claim  
7 for abuse or neglect of a vulnerable person against all defendants.

## 8 **A. Eighth and Fourteenth Amendment Claims**

### 9 **1. Proper Claim**

10 The complaint alleges that Redbird was a pretrial detainee at the time of the alleged  
11 events. A pretrial detainee's right to be free from punishment is grounded in the Due Process  
12 Clause, though courts borrow from Eighth Amendment jurisprudence when analyzing the rights  
13 of pretrial detainees. *See Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008).

14 The defendants argue that Redbird's Eighth Amendment claims should be dismissed  
15 because, as a pretrial detainee, her claims arise under the Fourteenth Amendment. ECF No. 5 at  
16 4. It appears Redbird pleaded guilty prior to the alleged incident but was sentenced after the  
17 incident. ECF No. 7 at 5. Redbird notes that district courts in the Ninth Circuit have split as to  
18 whether individuals who have pleaded guilty but not yet been sentenced should be treated as  
19 pretrial detainees or as convicted prisoners. *Id.* at 6; *compare Fitzpatrick v. Las Vegas Metro*  
20 *Police Dep't*, 2020 WL 560582 (D. Nev. 2020) (applying Eighth Amendment jurisprudence to  
21 such claims), with *Pitts v. Espinda*, 2016 WL 11696326 at n.4 (D. Haw. July 21, 2016) (applying  
22 Fourteenth Amendment jurisprudence.) Redbird takes no position as to whether her claims  
23 should be considered under the Eighth or Fourteenth Amendments, and instead argues that both

1 claims should proceed. ECF No. 7 at 6-7. I decline to adopt Redbird's position that she should  
2 be allowed to proceed under both the Eighth and Fourteenth Amendments. Her claims are  
3 governed by either the Eighth Amendment or the Fourteenth Amendment, not both. In reply, the  
4 defendants ask that I resolve this conflict, but they take no position as to which claim should  
5 proceed.

6 Although I am not aware of any cases in which the Ninth Circuit Court of Appeals has  
7 directly addressed whether the Eighth Amendment applies to individuals who have been  
8 convicted or pleaded guilty but have not yet been sentenced, the Ninth Circuit has repeatedly  
9 stated that the Eighth Amendment applies to individuals who have been convicted and sentenced.  
10 *See Glair v. City of Santa Monica*, 649 F. App'x 411, 412 (9th Cir. 2016) (holding that Eighth  
11 Amendment claims were properly dismissed because the plaintiff "was not convicted and  
12 sentenced for any violation."), *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001)  
13 (stating that the "Eighth Amendment's prohibition of 'cruel and unusual punishments' applies  
14 only 'after conviction and sentence'" (quoting *Graham v. Connor*, 490 U.S. 386, 393 n.6  
15 (1989))). Although they are not directly on point, these statements from the Ninth Circuit Court  
16 of Appeals are persuasive.

17 Because Redbird had pleaded guilty, the state had the power to punish her through  
18 incarceration, including harsh prison conditions that could rise to the level of punishment and  
19 would be prohibited for pretrial detainees under the Fourteenth Amendment. But Redbird had  
20 not yet been sentenced to a term of incarceration as punishment for her crime. Her incarceration  
21 at the time of the incident was not part of her sentence and punishment. Rather, she was being  
22 detained pending sentencing. As such, I find that Redbird claim's fall under the Fourteenth  
23 Amendment's due process clause and jurisprudence for pretrial detainees, rather than the Eighth

1 Amendment. Accordingly, I dismiss Redbird's Eighth Amendment claim with prejudice, as  
2 amendment would be futile.

## 3 **2. Fourteenth Amendment Claim**

4 A pretrial detainee states a claim for failure-to-protect against an individual officer under  
5 the Fourteenth Amendment if: (1) the defendant made an intentional decision with respect to the  
6 conditions under which the detainee was confined; (2) those conditions put the detainee at  
7 substantial risk of suffering serious harm; (3) the defendant did not take reasonable available  
8 measures to abate that risk, even though a reasonable officer in the circumstances would have  
9 appreciated the high degree of risk involved—making the consequences of the defendant's  
10 conduct obvious; and (4) by not taking such measures, the defendant caused the detainee's  
11 injuries. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016).

12 Redbird states a colorable claim against Madrid and Crooks. The complaint alleges that  
13 Redbird informed Madrid and Crooks that Henley had threatened her, and neither Madrid nor  
14 Crooks took appropriate action to ensure Redbird's safety. Despite being told of the threat,  
15 Crooks placed Redbird in the same housing area with Henley and took no steps to protect  
16 Redbird. As a result, Redbird was attacked. These allegations are sufficient to support a  
17 Fourteenth Amendment claim against Madrid and Crooks.

18 The defendants argue that when Redbird told Madrid about the threat, she was not in  
19 danger because she and Henley were not yet housed in the same area. Thus, the defendants  
20 argue, Madrid was not required to take any action to protect Redbird. I am not persuaded.  
21 Although Madrid may not have known definitively when, or even if, Redbird would encounter  
22 Henley, Madrid knew that a specific and serious threat had been made against Redbird and that it  
23 was possible that Redbird could encounter Henley if housed in the same area at CCDC. The fact

1 that Madrid did not know definitively if or when Redbird would encounter Henley next does not  
2 absolve Madrid of any responsibility for Redbird's safety. Redbird alleges that Madrid failed to  
3 take appropriate action to ensure that she was protected from Henley. This alleged failure on  
4 Madrid's part contributed to Redbird being moved to Henley's unit and the attack by Henley. As  
5 such, I deny the motion to dismiss Madrid from this claim.

6 **B. Monell Claim**

7 A municipality may be found liable under 42 U.S.C. § 1983 only where the municipality  
8 itself causes the violation at issue. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989)  
9 (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)). To state a claim  
10 for municipal or county liability, a plaintiff must allege that she suffered a constitutional  
11 deprivation that was the product of a policy or custom of the local government unit. *City of*  
12 *Canton*, 489 U.S. at 385. "Official municipal policy includes the decisions of a government's  
13 lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to  
14 practically have the force of law." See *Connick v. Thompson*, 563 U.S. 51, 61 (2011).  
15 Municipalities are not vicariously liable under § 1983 for their employees' actions. *Id.* at 60.

16 To adequately allege a custom, a plaintiff must allege facts sufficient to show  
17 a longstanding practice or custom that constitutes the standard operating procedure of the  
18 entity. See *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). "The custom must be so  
19 'persistent and widespread' that it constitutes a permanent and well settled city  
20 policy." *Id.* (quoting *Monell*, 436 U.S. at 691). "Liability for improper custom may not be  
21 predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient  
22 duration, frequency and consistency that the conduct has become a traditional method of carrying  
23 out policy." *Id.*



1 Redbird cites to *Karim-Panahi*, 839 F.2d at 621 (9th Cir. 1988), for the proposition that  
2 *Monell* claims should be construed very generously in a plaintiff's favor. The court in that case  
3 allowed *Monell* claims to proceed "even if the claim is based on nothing more than a bare  
4 allegation that the individual officers' conduct conformed to official policy, custom, or practice."  
5 839 F.2d at 624 (9th Cir. 1988) (quoting *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th  
6 Cir. 1986). But that case was decided prior to *Iqbal* and *Twombly*. Since then, the Ninth Circuit  
7 has recognized that a complaint must include factual allegations that go beyond a formulaic  
8 recitation of a cause of action's elements. *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th  
9 Cir. 2011) (citing *Twombly* 550 U.S. at 555 (2007)).

10 Redbird fails to state a colorable *Monell* claim. She vaguely alleges that the LVMPD and  
11 Doe Defendants VII-X "enforced, and applied an officially recognized custom, policy and  
12 practice," of among employing and retaining officers who failed to follow written policies,  
13 inadequately training officers, failing to discipline officers, showing a reckless disregard for the  
14 safety and wellbeing of gender nonconforming inmates, failing to properly train officers on the  
15 increased risk of harm gender nonconforming inmates face, and failing to properly train officers  
16 on housing moves.

17 But Redbird does not allege any facts to support these conclusory allegations. In her  
18 response brief, Redbird provides examples for potential *Monell* liability, arguing that a *Monell*  
19 claim would exist as if officers were trained to inform inmates that another inmate had  
20 complained about them, or if officers were trained to ignore complaints made by transsexuals.  
21 But the complaint does not allege that either of those is the policy or custom of LVMPD. In her  
22 response, Redbird also argues that CCDC had only a single protective custody unit, which led to  
23 Redbird, who was likely in protective custody because she was transgender, being housed with

1 Henley, who was in protective custody because he was so dangerous. But this policy is not  
2 mentioned in the complaint.

3 Redbird also points to a paragraph in the complaint which notes the number of  
4 complaints under the Prison Rape Elimination Act of 2003 (PREA) at CCDC, and she argues  
5 that this demonstrates that LVMPD is deliberately indifferent to sexually motivated offenses.  
6 But it is not clear how the number of PREA complaints demonstrates that LVMPD is indifferent  
7 to the safety of transgender inmates. As an initial matter, the fact that a complaint has been filed  
8 does not mean that it has any validity. Furthermore, PREA complaints can potentially cover a  
9 wide variety of issues, many of which are not related to the safety of transgender inmates, which  
10 is the basis of this action. Redbird's reference to the number of PREA complaints filed at CCDC  
11 is not sufficient to support a *Monell* claim against LVMPD.

12 In the complaint, Redbird does not point to any specific, official policy of LVMPD that  
13 led to the alleged violations. Nor does Redbird point to any specific practices or customs that  
14 were so persistent and widespread that they constituted a settled policy. The complaint amounts  
15 to no more than conclusory allegations that LVMPD failed to properly train and supervise  
16 employees, and LVMPD's policies failed to protect inmates. Such vague, conclusory allegations  
17 are insufficient to state a claim. *See, Correa v. Las Vegas Metro. Police Dep't*, No. 2:16-cv-  
18 01852-JAD-NJK, 2016 WL 7320879, at \*4 (D. Nev. Dec. 15, 2016) (explaining that a  
19 conclusory allegation that LVMPD had a policy allowing excessive force through managerial  
20 officials' "failure to properly train and supervise" was insufficient to state a plausible claim  
21 under *Iqbal* and *Twombly*). Accordingly, I dismiss this claim without prejudice and with leave to  
22 amend. If Redbird wishes to pursue this claim in an amended complaint, she must allege specific  
23 facts showing the alleged constitutional deprivation was the result of LVMPD's policy or

1 custom.

## 2 **C. Negligence**

3 To establish a negligence claim under Nevada law, a plaintiff must assert: “(1) the  
4 existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages.”  
5 *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280, 125 Nev. 818, 824 (Nev.  
6 2009) (citation omitted). The Supreme Court of Nevada has stated that as a general rule, “state  
7 officials have a duty to exercise ordinary care in performing their duties.” *Butler ex rel. Biller v.*  
8 *Bayer*, 168 P.3d 1055, 1065, 123 Nev. 450, 464 (Nev. 2007) (citing *State v. Silva*, 478 P.2d 591,  
9 592, 86 Nev. 911, 914 (Nev. 1970)).

### 10 **1. Crooks and Madrid**

11 Redbird states a negligence claim against Crooks and Madrid. The defendants do not  
12 contest the existence of a negligence claim against Crooks. As for Madrid, the defendants first  
13 argue that because the complaint did not allege that Madrid knew that Redbird would be moved  
14 to Hensley’s unit, Madrid did not have an obligation to take any steps beyond notifying the unit  
15 officer about the threat. The complaint does not allege that Madrid notified the unit officer, only  
16 that Madrid told Redbird that he would notify the unit officer. Whether Madrid followed  
17 through on this promise is not known.

18 That complaint alleges that Redbird notified Madrid of a specific threat to his life from a  
19 specific inmate, and that later that same day Redbird was placed near that inmate and attacked.  
20 These allegations are sufficient to support a colorable claim that Madrid breached his duty to  
21 Redbird by failing to take steps to ensure Redbird’s safety.

22 The defendants also argue that any negligence claim is barred by Nevada’s discretionary  
23 immunity statute. Nevada Revised Statutes § 41.032 provides immunity to state employees or

any state agency or political subdivision for claims that are “[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved is abused.” Nev. Rev. Stat. § 41.032(2). Under Nevada law, “to fall within the scope of discretionary-act immunity, a decision must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy.” *Martinez v. Maruszczak*, 168 P.3d 720, 727 (Nev. 2007).

The defendants cite to *Sells v. McDaniel*, No. 3:08-cv-170-BES-RAM, 2009 WL 3464982 for the proposition that a decision regarding housing of prisoners falls within discretionary immunity. But *Sells* involved a motion for summary judgment, not a motion to dismiss. At this point, it is not clear what decisions Madrid made regarding Redbird’s safety. I thus cannot determine whether any decisions Madrid made regarding Redbird involved individual judgment or were based on considerations of social, economic, or political policy. Accordingly, I deny the motion to dismiss the negligence claim against Madrid.

## 2. LVMPD

Redbird fails to state a negligence claim against LVMPD. Redbird alleges that LVMPD breached its duty to Redbird by failing to “to maintain adequate policies and procedures for protecting inmates from harm by other inmates, to include protection of gender nonconforming inmates in the jail setting.” But she does not include any facts to support the conclusory allegation that the policies were inadequate.

Redbird argues that at the pleading stage she is not required to specify how LVMPD’s policies were deficient, and that it is sufficient simply to allege that LVMPD failed to promulgate reasonable policies. But conclusory allegations, such as Redbird’s vague allegations of inadequate policies, are not entitled to the assumption of truth and must be supported with factual

1 allegations. *Iqbal*, 556 U.S. at 679. The complaint does not include any factual allegations to  
2 support Redbird's conclusory statements about inadequate policies, and thus the allegations are  
3 insufficient to state a claim against LVMPD. I dismiss the negligence claim against LVMPD  
4 without prejudice and with leave to amend. If Redbird wishes to pursue this claim in an  
5 amended complaint, she must include factual allegations to support her conclusory claims that  
6 LVMPD's policies were deficient.

#### 7 **D. Negligent Training, Supervision, and Retention**

8 As discussed *supra* in Section II(C)(1), Nevada Revised Statutes § 41.032 provides  
9 immunity for claims that are based on the exercise of discretionary functions. Nevada looks to  
10 interpretations of the Federal Tort Claims Act for guidance on what conduct is protected by  
11 discretionary immunity. *Martinez*, 168 P.3d at 729. The Ninth Circuit and other circuits have  
12 held that "decisions relating to the hiring, training, and supervision of employees usually involve  
13 policy judgments of the type Congress intended the discretionary function exception to shield."  
14 *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (collecting cases). However, actions  
15 taken in bad faith are not within an actor's discretion. *Falline v. GNLV Corp.*, 823 P.2d 888, 892  
16 n.3 (Nev. 1991). The Supreme Court of Nevada recently affirmed that § 41.032 applies to claims  
17 of negligent hiring, training, and supervision. *See Paulos v. FCHI, LLC*, 136 Nev. 18, 25, 456  
18 P.3d 589, 595 (2020).

19 Redbird's claim for negligent hiring, training, supervision, and retention are barred by  
20 discretionary immunity. Despite the *Paulos* decision that § 41.032 applies to such claims,  
21 Redbird argues that LVMPD's decisions about training, supervision, and retention were done in  
22 bad faith. But the allegations in the complaint about LVMPD are entirely conclusory. The  
23 complaint does not include any specific allegations that would support that LVMPD acted in bad

1 faith in its decisions about training, supervision, or retention.

2 Accordingly, I dismiss this claim without prejudice and with leave to amend. If Redbird  
3 wishes to pursue this claim in an amended complaint, she must allege specific facts sufficient to  
4 support that LVMPD acted in bad faith in its decisions about training, supervision, or retention.

5 **E. Intentional Infliction of Emotional Distress**

6 To state a claim for intentional infliction of emotional distress, a plaintiff must allege  
7 (1) that the defendant's conduct was extreme and outrageous; (2) that the defendant either  
8 intended or recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually  
9 suffered severe or extreme emotional distress; and (4) that the defendant's conduct actually or  
10 proximately caused the distress. *Olivero v. Lowe*, 995 P.2d 1023, 1025 (Nev. 2000). "[E]xtreme  
11 and outrageous conduct is that which is outside all possible bounds of decency and is regarded as  
12 utterly intolerable in a civilized community." *Maduikie v. Agency Rent-A-Car*, 953 P.2d 24, 26  
13 (Nev. 1998) (quotation omitted).

14 Redbird fails to state a colorable claim of intentional infliction of emotional distress. The  
15 complaint contains a conclusory allegation that Redbird suffered "humiliation, anxiety,  
16 embarrassment, and severe emotional distress," but it does not explain the nature of that  
17 emotional distress or any factual allegations to support that it was "severe or extreme." In her  
18 response brief, Redbird states that after moving her to "a cell near Henley, Crooks left her there  
19 to sob in fear for hours as Henley yelled threats throughout the cell block." But those allegations  
20 are not part of the complaint. Because the vague, conclusory allegations in the complaint are  
21 insufficient to support that Redbird suffered severe or extreme emotional distress, I dismiss this  
22 claim without prejudice and with leave to amend.

23 ////

1           **F. Abuse or Neglect of a Vulnerable Person**

2           Redbird brings a claim under Nevada Revised Statutes § 41.1395, which provides  
3 protection for “vulnerable” persons. The statute defines vulnerable as a person who: “(1) Has a  
4 physical or mental impairment that substantially limits one or more of the major life activities of  
5 the person; and (2) Has a medical or psychological record of the impairment or is otherwise  
6 regarded as having the impairment.” The term “vulnerable” includes, “without limitation, a  
7 person who has an intellectual disability, a person who has a severe learning disability, a person  
8 who suffers from a severe mental or emotional illness or a person who suffers from a terminal or  
9 catastrophic illness or injury.” *See Nev. Rev. Stat. § 31.1395(e).*

10           I have previously held that § 41.1395 does not create a stand-alone cause of action but  
11 provides for special damages for other claims. *Borenstein v. Animal Found.*, No. 2:19-cv-00985-  
12 APG-DJA, 2021 WL 1035100, at \*7 (D. Nev. Mar. 17, 2021). Redbird concedes that case law  
13 does not clearly support that § 41.1395 provides a separate cause of action, but she argues that a  
14 recent Supreme Court of Nevada decision seems to embrace “elder abuse” under § 41.1395 as a  
15 distinct claim from negligence. Redbird also argues that even if § 41.1395 does not allow for an  
16 independent claim, the allegations in the complaint are sufficient to provide for special damages  
17 under that statute. Because Redbird has not sufficiently pleaded that she was a vulnerable person  
18 under § 41.1395, I need not resolve this issue.

19           Redbird alleges that she suffers from gender dysphoria, depression, anxiety, and post-  
20 traumatic stress disorder. She also alleges that her impairments “limit one or more major life  
21 activities,” including interacting with others, social functioning, and reproducing.

22           Even accepting Redbird’s vague statements regarding her mental health and her  
23 limitations, the allegations are insufficient to support that she has a “severe” mental or emotional

1 illness or that it “substantially” limits any major life activity. As such, I dismiss this claim  
2 without prejudice, and with leave to amend.

### 3 **III. LEAVE TO AMEND**

4 I grant Redbird leave to file an amended complaint to cure the deficiencies of the  
5 complaint. An amended complaint supersedes the original complaint so the amended complaint  
6 must be complete in itself. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d  
7 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact that a party was named in the original  
8 complaint is irrelevant; an amended pleading supersedes the original”); *see also Lacey v.*  
9 *Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims dismissed with  
10 prejudice, a plaintiff is not required to reallege such claims in a subsequent amended complaint  
11 to preserve them for appeal). Redbird’s amended complaint must contain all claims, defendants,  
12 and factual allegations that she wishes to pursue in this lawsuit.

13 If Redbird chooses to file an amended complaint curing the deficiencies outlined in this  
14 order, she must file the amended complaint by **September 17, 2021**. If she chooses not to file an  
15 amended complaint, this action will proceed on Redbird’s colorable claims, as discussed in this  
16 order.

### 17 **IV. CONCLUSION**

18 I therefore order that the complaint located at ECF No. 1-1 be filed as the operative  
19 complaint by the Clerk of the Court.

20 I further order that Redbird’s Eighth Amendment claims are dismissed with prejudice, as  
21 amendment would be futile.

22 I further order that Redbird’s failure to protect claim under the Fourteenth Amendment  
23 will proceed against Crooks and Madrid.



1 I further order that Redbird's *Monell* claims are dismissed without prejudice and with  
2 leave to amend.

3 I further order that Redbird's state law negligence claim will proceed against Crooks and  
4 Madrid.

5 I further order that Redbird's negligence claim against LVMPD is dismissed without  
6 prejudice and with leave to amend.

7 I further order that Redbird's state law negligent training, supervision, and retention  
8 claim is dismissed without prejudice and with leave to amend.

9 I further order that Redbird's state law intentional infliction of emotional distress claim is  
10 dismissed without prejudice and with leave to amend.

11 I further order that Redbird has not sufficiently pleaded that she is a vulnerable person  
12 under Nevada Revised Statutes § 41.1395, so I dismiss any independent claim or any claim for  
13 special damages under this statute without prejudice and with leave to amend.

14 I further order that, to the extent that this order is inconsistent with the defendants'  
15 motion to dismiss (ECF No. 5) the motion to dismiss is DENIED.

16 I further order that, if Redbird chooses to file an amended complaint curing the  
17 deficiencies of her complaint as outlined in this order, she will file the amended by **September**  
18 **17, 2021**.

19 I further order that, if Redbird fails to timely file an amended complaint, this action will  
20 proceed on Redbird's colorable claims, as outlined in this order.

21 DATED THIS 17th day of August 2021.

22   
23 UNITED STATES DISTRICT JUDGE